IN THE

Supreme Court of the United States

VFJ VENTURES, INC., F/K/A VF JEANSWEAR, INC.,
Petitioner,

v.

G. THOMAS SURTEES, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE FOR THE STATE OF ALABAMA, AND THE ALABAMA DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Alabama's "add-back" statute discriminates against interstate commerce in violation of the Commerce Clause by denying a deduction for ordinary business expenses because they are paid to corporations located outside Alabama in a State that has chosen not to tax those payments.

2. Whether Alabama's "add-back" statute violates the Due Process and Commerce Clauses by denying a deduction for ordinary business expenses paid to corporations located outside Alabama based on the tax policy of the State in which those corporations are located.

LIST OF PARTIES AND AFFILIATES

Petitioner is VFJ Ventures, Inc., f/k/a VF Jeanswear, Inc. Respondents are G. Thomas Surtees, in his official capacity as Commissioner of the Department of Revenue for the State of Alabama, and the Alabama Department of Revenue.

Pursuant to Rule 29.6 of the Rules of this Court, VFJ Ventures, Inc. discloses that it is a wholly owned subsidiary of Wrangler Apparel Corp., which is a wholly owned subsidiary of Ring Company, which, in turn, is a wholly owned subsidiary of V.F. Corporation, which is a publicly traded company. PNC Bank, N.A., owns more than 10% of V.F. Corporation's stock. PNC Bank, N.A., is owned by The PNC Financial Services Group, Inc., which is a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner VFJ Ventures, Inc. ("VFJ") respectfully requests that this Court grant the petition for a writ of certiorari to review the decision and judgment of the Supreme Court of Alabama.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is not yet reported, but is available at 2008 Ala. LEXIS 197, and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-3a. The opinion of the Alabama Court of Civil Appeals is not yet reported, but is available at 2008 Ala. Civ. App. LEXIS 50 and reproduced at Pet. App. 4a-64a. The opinion of the Circuit Court of Montgomery County, Alabama, is unreported and is reproduced at Pet. App. 65a-77a.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on September 19, 2008. On December 2, 2008, Justice Thomas extended the time to file a petition for a writ of certiorari to January 20, 2009. This Court was closed on January 20, 2009. See Sup. Ct. R. 30.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . ."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, § 1,

provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Alabama Code Sections 40-18-33 and 40-18-35(b) are reproduced at Pet. App. 78a-80a.

INTRODUCTION

This case concerns the State of Alabama's discriminatory treatment of ordinary business expenses in the form of royalties paid by petitioner VFJ to two related Delaware corporations, The H.D. Lee Company, Inc. ("Lee") and Wrangler Apparel Corp., as successor to Wrangler Clothing Corp. ("Wrangler"). Because Lee and Wrangler are located in Delaware (a State that has chosen not to tax these royalty payments), Alabama law requires VFJ to "add back" those payments, which otherwise would have been deductible from its Alabama income, when calculating its Alabama income tax obligation. Ala. Code § 40-18-35(b). In the decision below, the Alabama Supreme Court rejected VFJ's constitutional challenges to Alabama's taxing scheme. Pet. App. 2a. That ruling warrants this Court's review.

First, the decision of the Alabama Supreme Court conflicts with decisions of this Court holding that a State may not adopt a tax system that "taxes a transaction or incident more heavily when it crosses state lines." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 331 (1996) (internal quotation marks and alteration omitted); see *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). The discrimination in Alabama's add-back statute is manifest. If Lee and Wrangler were located in Alabama (or another State that shares Alabama's policy of taxing royalty payments), then VFJ could have deducted its royalty payments from its Alabama income for the tax year

at issue. See *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 274-75 (1988). Because Lee and Wrangler are located in Delaware, however, Alabama required VFJ to "add back" those payments to its taxable Alabama income and to pay an additional $1 million in Alabama income taxes.

Second, the decision of the Alabama Supreme Court conflicts with this Court's decisions holding that the Commerce and Due Process Clauses require States to apportion fairly income from interstate transactions. See, *e.g.*, *Hunt-Wesson, Inc.* v. *Franchise Tax Bd.*, 528 U.S. 458 (2000); see also *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 164 (1983) (Due Process and Commerce Clauses prevent a State from taxing "'value earned outside its borders'"). Fair apportionment requires that a state taxing statute must "'actually reflect a reasonable sense of how income is generated.'" *Hunt-Wesson*, 528 U.S. at 466 (quoting *Container Corp.*, 463 U.S. at 169). Here, Alabama law violates the Constitution because it attributes income to Alabama based not upon VFJ's conduct in Alabama, but instead upon the tax policy of the State (Delaware) in which Lee and Wrangler are located.

Finally, there is a pressing need to address the conflict between the decision below and this Court's cases. The need for prompt review is especially important because add-back statutes like the one enacted by Alabama have been adopted by 19 other States and have been advocated for adoption in others. See *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000) (granting review to assess conflict between state political contribution statute and prior Court precedent given the "large number of States that limit political contributions"). Moreover, a determination of the constitutionality of the Alabama add-

back statute is critically important both for the taxpayers subjected to such provisions and to the States that would be required to remedy any unconstitutional deprivation. See, *e.g.*, *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990). Taxpayers and States from across the Nation thus would benefit from this Court's immediate review of the decision below.

The petition for writ of certiorari should be granted.

STATEMENT OF THE CASE

A. Statutory Background

The State of Alabama imposes an income tax on corporations that do business or derive income from sources within Alabama. Ala. Code §§ 40-18-2(a), -31. Under Alabama law, the starting point for determining a corporation's Alabama taxable income is the corporation's federal taxable income. *Id.* § 40-18-33. Alabama law requires a corporation to make adjustments to its federal taxable income and to determine the amount "allocated and apportioned to Alabama." *Id.* §§ 40-18-33, -34.[1]

In 2001, Alabama altered its method for calculating a corporation's Alabama taxable income by enacting the "add-back" statute at issue in this case. Ala. Code § 40-18-35(b); Pet. App. 12a. Section 40-18-35(b) sets forth "[r]estrictions on the deductibility of certain intangible expenses and interest expenses with a

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[1] Alabama uses an apportionment formula that considers what fraction of the taxpayer's payroll, property, and sales are located in-state. Pet. App. 6a-7a; *see* Ala. Code § 40-27-1, art. IV, ¶ 9. The formula yields a percentage, known as the taxpayer's "Alabama apportionment factor," that is applied to the taxpayer's apportionable income to determine its Alabama taxable income. Pet. App. 6a-7a.

related member." Ala. Code § 40-18-35(b). As relevant here, the add-back statute provides: "For purposes of computing its taxable income, a corporation shall add back otherwise deductible . . . intangible expenses and costs directly or indirectly paid . . . to . . . one or more related members, except to the extent the corporation shows . . . that the corresponding item of income was in the same taxable year: a. *Subject to a tax based on or measured by the related member's net income in Alabama or any other state of the United States* . . . ." *Id.* § 40-18-35(b)(1) (emphasis added).[2] The add-back statute further provides: "For purposes of this section, 'subject to a tax based on or measured by the related member's net income' means that the receipt of the payment by the recipient related member is reported and included in income for purposes of a tax on net income" of the related member. *Id.*[3]

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[2] A "related member" is defined to include entities in a commonly owned corporate group that includes the taxpayer. Ala. Code § 40-18-1(28)-(29).

[3] As relevant here, the add-back statute provides two additional exceptions to the "add-back" requirement: (i) where the "corporation establishes that the adjustments are unreasonable, or the corporation and the Commissioner of Revenue agree in writing to the application," or (ii) "if the corporation can establish that" [1] "the transaction giving rise to the interest expenses and costs or the intangible expenses and costs between the corporation and the related member did not have as a principal purpose the avoidance of any Alabama tax" and [2] "the related member is not primarily engaged in the acquisition, use, licensing, maintenance, management, ownership, sale, exchange, or any other disposition of intangible property, or in the financing of related entities." Ala. Code § 40-18-35(b)(2)-(3). In 2008, Alabama amended its add-back statute to codify the Alabama Supreme Court's conclusion that the subject-to-tax exception applied only on a post-apportionment basis and to provide an additional exception when the related

Alabama taxes income from royalty payments for intangible assets. See Ala. Code § 40-27-1, art. IV ¶ 1(a). Thus, under the add-back statute, if a corporation in Alabama makes a royalty payment to a related corporation located in Alabama (or another State that shares Alabama's policy of taxing royalty payments), then that payment remains deductible from Alabama income. *Id.* § 40-18-35(b). If, however, that same Alabama taxpayer instead makes its royalty payments to a related corporation located in a State that, unlike Alabama, has chosen not to tax royalty payments (such as Delaware, Nevada, Wyoming, or South Dakota), then it is denied the deduction for this ordinary business expense.

B. Factual Background

Petitioner VFJ is a corporation headquartered in North Carolina that manufactures and sells Lee and Wrangler jeanswear throughout the United States. During the tax year at issue, VFJ operated a cutting facility and two distribution facilities in Alabama, and therefore filed an Alabama income tax return. Pet. App. 5a. The trademarks for Lee and Wrangler are owned by The H.D. Lee Company, Inc. ("Lee") and Wrangler Apparel Corp., as successor to Wrangler Clothing Corp. ("Wrangler"). *Id.* at 8a. Lee and Wrangler are Delaware corporations that do not file income tax returns in Alabama. Although VFJ, Lee, and Wrangler are separate companies, they are "related members" within the meaning of Alabama law because they are affiliated subsidiaries of V.F. Corporation. *Id.* at 66a-67a.

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member pays the royalty income to an unrelated third party. *See* Ala. Laws 2008-543, § 1. Those amendments have no bearing on the constitutional issues raised in this petition.

Lee and Wrangler license their respective trademarks in arm's-length agreements with both unrelated third parties and related companies like VFJ. Pet. App. 8a. For example, in 2001, 22% of Lee's royalty income was derived from payments by unrelated third parties. *Id.* at 69a. Notably, Lee and Wrangler charge VFJ the same 5% royalty rate that they typically charge to unrelated third-parties. *Id.* at 8a-9a; Trial Tr. 196-97.

In the past, responsibility for managing Lee's and Wrangler's trademarks was dispersed among different divisions of various V.F.-related manufacturing companies around the world. Pet. App. 17a, 67a-68a. The fragmented nature of this trademark management prevented the development of trademark expertise or coordination of licensing efforts. *Id.* V.F. Corporation isolated the Lee trademarks in a separate corporation in 1983, and did the same with the Wrangler trademarks in 1993. Trial Tr. 238. As a result, a staff of trademark specialists in Delaware now coordinates trademark registrations around the world, negotiates and monitors licensing agreements, and guards the trademarks against infringement. Pet. App. 17a-21a. The Lee and Wrangler trademark portfolios have been valued at about $5 billion. *Id.* at 66a-67a.

In 2001, VFJ paid royalties of $36.22 million and $66.42 million to Lee and Wrangler, respectively, to use their trademarks. Pet. App. 9a. VFJ deducted those royalty payments as ordinary and necessary business expenses on its 2001 federal income tax return. *Id.* Those deductions flowed through to VFJ's Alabama apportionable income and reduced its taxable income. *Id.* at 9a-10a. VFJ's apportionment factor for Alabama in 2001 was approximately 13.9%. *Id.* at 7a. Applying that factor to VFJ's apportionable

income yielded $13,702,000 in Alabama taxable income. *Id.* VFJ paid Alabama tax on that amount.

The Alabama Department of Revenue ("the Department") audited VFJ's 2001 return and concluded that Alabama's add-back statute required VFJ to add back a portion of the deductions taken for royalty payments to Lee and Wrangler. Pet. App. 15a. In 2001, Lee and Wrangler paid income tax on a portion of their royalty income in North Carolina, the home State of V.F. Corporation. *Id.* at 72a. The Department concluded that the North Carolina portions of the royalty payments were subject to tax in North Carolina within the meaning of the add-back statute, and therefore exempted the North Carolina portions of the royalty payments from the add-back requirement. *Id.* at 42a-44a. The Department, however, required VFJ to add back the remainder of the royalty payments and assessed tax on that amount of additional income. *Id.* The Department issued an additional assessment of $1.02 million. *Id.* at 15a.

C. Proceedings Below

1. VFJ sought relief from the $1.02 million assessment in the Circuit Court of Montgomery County, Alabama. It challenged the application of Alabama's add-back statute on both statutory and federal constitutional grounds. Pet. App. 65a-66a. The circuit court conducted a multi-day trial at which it "had the benefit of hearing from the premier experts in the fields of taxation and patents and trademarks." *Id.* at 66a.

The circuit court found that that Lee and Wrangler "carry on substantial activities" in Delaware, Pet. App. 69a, and that while "[c]entralization of trademarks" in Lee and Wrangler "had beneficial state tax

effects for the VF group," it also "increased efficiency by concentrating management in one group of employees instead of being spread throughout the various operating subsidiaries around the world." *Id.* at 67a.[4] The circuit court found that these Delaware entities "monitor and maintain thousands of trademark registrations throughout the world," *id.* at 69a, and "license trademarks to VF affiliates" as well as "numerous third parties." *Id.*

Based on this factual record, the circuit court held that, as a matter of Alabama statutory law, application of the add-back statute was unwarranted because VFJ had satisfied a statutory exception to the add-back requirement by showing that adding back these royalty payments to its income would be "unreasonable." Specifically, the circuit court concluded that add-back of the royalty payments was "unreasonable" because "VFJ's royalty payments are not abusive – they have economic substance and business purpose – and represent real and necessary costs of doing business in Alabama." Pet. App. 75a. As a result, the circuit court concluded that "to disallow these deductions would distort the amount of VFJ's income fairly attributable to this state." *Id.* Because it resolved VFJ's challenge on statutory grounds, the circuit court did not address the parties' arguments regarding "the constitutionality of the add-back statute." *Id.* at 77a.

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[4] For example, the trial court found that centralization of trademarks in Lee and Wrangler (i) "allowed the employees to develop the expertise necessary to maintain the necessary registrations and monitor and combat infringement worldwide," (ii) "reduced duplicative efforts, costs, and reliance on outside counsel," and (iii) "allowed third party licensing efforts to be coordinated and managed." Pet. App. 67a-68a.

2. On appeal, the Alabama Court of Civil Appeals reversed. It rejected the circuit court's conclusion that the Alabama legislature adopted the "add-back statute to address the problem of sham transactions" or "to create a new method by which it could challenge sham transactions." Pet. App. 36a. Rather, the court of appeals concluded that the legislature intended "to eliminate, subject to certain exceptions, one type of deduction for ordinary and necessary business [expenses]." *Id.* at 37a. The court adopted the Department's construction of the add-back statute, ruling that the "unreasonableness exception" did not apply because there had been no showing that "the add-back statute results in taxation that is out of proportion to [VFJ's] activities in Alabama." *Id.* at 39a.

Having rejected VFJ's statutory challenge to the application of the add-back requirement, the court of appeals turned to VFJ's federal constitutional challenges. The court of appeals rejected VFJ's showing that the add-back statute was discriminatory. The court stated that the subject-to-tax exception "applies when the related member's income is taxed 'in Alabama *or any other State* of the United States'" and thus the exception "is implicated regardless of which state imposes a tax on the related member's income." Pet. App. 62a. The court held that the add-back statute does not "discriminate against interstate commerce" because "the language of the subject-to-tax exception clearly indicates that, with regard to that exception, the application of Alabama's add-back statute does not benefit in-state corporations to the detriment of, or disproportionately to, out-of-state corporations." *Id.*

Likewise, the court of appeals rejected VFJ's showing that the "add-back statute results in a tax

that is not fairly apportioned to Alabama." Pet. App. 56a. The court of appeals did not expressly address VFJ's showing that, under the add-back statute, the determination whether VFJ is taxed on its royalty payment to Lee and Wrangler turns on an analysis of the tax policy of the State of Delaware. *Id.* at 58a-61a. Instead, the court concluded that "the evidence did not demonstrate that the application of the add-back statute has resulted in taxation that is out of proportion to VFJ's activities in this State [Alabama]." *Id.* at 60a. As such, the court held that that "VFJ has not demonstrated that the add-back statute results in taxation of income that is not fairly attributable to Alabama." *Id.* at 61a.

3. VFJ appealed to the Alabama Supreme Court. VFJ again demonstrated that the add-back statute violated the United States Constitution because it was discriminatory and did not fairly apportion VFJ's income. Opening Brief 25-35; Reply Brief 6-19. The Alabama Supreme Court rejected VFJ's constitutional challenges, affirmed the judgment of the court of appeals, and adopted the court of appeals' "opinion in its entirety, as the opinion of this Court." Pet. App. 2a.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the decision of the Alabama Supreme Court squarely conflicts with this Court's decisions holding that State tax statutes may not discriminate against interstate commerce. See, *e.g.*, *Fulton*, 516 U.S. at 331. The Alabama add-back statute prevents VFJ from deducting multi-million dollar arm's-length royalty payments to Lee and Wrangler solely because Lee and Wrangler are located outside Alabama in a State (Delaware) that does not share Alabama's

policy of taxing these payments. The Commerce Clause prohibits Alabama from discriminating against interstate commerce or conditioning favored treatment on another State's adoption of Alabama's taxing policy. The decision below, which approves of that discrimination, directly conflicts with this Court's Commerce Clause decisions. See, *e.g.*, *New Energy*, 486 U.S. at 274-75.

Similarly, review should be granted because the Alabama Supreme Court's decision conflicts with this Court's decisions holding a State must "fairly apportion" income from interstate transactions. See, *e.g.*, *Hunt-Wesson*, 528 U.S. at 467-68. Alabama's add-back statute violates that requirement because it does not attribute royalty income to VFJ based on "'a reasonable sense of how income is generated.'" *Id.* at 466 (quoting *Container Corp.*, 463 U.S. at 169). Rather, the apportionment to Alabama is based on an assessment of the tax policy of a sister State without regard to VFJ's economic activity in Alabama.

There is a pressing need to address the conflicts implicated by the decision below. This Court has underscored the importance of reviewing claims of discrimination by States against interstate commerce even when the offending statute was limited in its scope and unique to a single State. *E.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 595 (1997). Here, the need for immediate review is far more pronounced because the Alabama add-back statute has a broad sweep within Alabama and, further, because similar discriminatory statutes have been adopted by nearly 20 States (and have been advocated for adoption in others). Prompt determination of the constitutionality of the add-back statute is critically important both for the taxpayers who are presently subjected to such provisions and to

the States that would be required to remedy any unconstitutional deprivation and address any budgetary shortfalls resulting from an adverse decision. See, *e.g.*, *McKesson*, 496 U.S. at 31. In short, the sooner the constitutionality of these add-back statutes is resolved, the better – for all involved.

The petition for writ of certiorari should be granted.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

Under the Due Process and Commerce Clauses, a state tax must "not discriminate against interstate commerce" and must be "fairly apportioned." *Complete Auto*, 430 U.S. at 279. Review is warranted in this case because Alabama's "add-back" statute violates both of these bedrock constitutional requirements.

A. The Decision Below Conflicts With This Court's Decisions Holding That A State May Not Discriminate Against Interstate Commerce.

1. This Court has long confirmed that the Commerce Clause's grant of regulatory power to Congress has "a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 98 (1994) (citing cases). That negative aspect "reflect[s] the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 335-36 (1989) (footnote omitted). In the tax arena, a state statute impermissibly discriminates against inter-

state commerce "if it taxes a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Fulton Corp.*, 516 U.S. at 331 (internal quotation marks and alteration omitted).

This Court's decision in *Fulton* is instructive. At issue in *Fulton* was North Carolina's "intangibles tax" on the fair market value of corporate stock held by North Carolina residents. *Id.* at 327-28. The North Carolina tax did not apply evenly to all stock holdings, but instead allowed residents to deduct the value of a stock to the extent that the issuing corporation was subject to tax in North Carolina. *Id.* at 328. Thus, a multi-state corporation doing five percent of its business in North Carolina would pay corporate income tax on 5% of its income, and a resident owner of that corporation's stock would pay tax on 95% of the stock's value. *Id.* By contrast, a corporation doing all of its business in North Carolina would pay corporate income tax on 100% of its income, and a resident owner of that corporation's stock would pay no tax on the stock's value.

This Court had "no doubt" that the North Carolina tax discriminated against interstate commerce because it taxed stock "only to the degree that its issuing corporation participated in interstate commerce," and "favor[ed] domestic corporations over their foreign competitors in raising capital among North Carolina residents." *Id.* at 333. As a result, the tax tended to "discourage domestic corporations from plying their trades in interstate commerce." *Id.*

2. Like the discriminatory tax invalidated in *Fulton*, the Alabama add-back statute imposes a differential burden on an Alabama taxpayer based upon the interstate nature of its ordinary and necessary business expenses. If Lee and Wrangler

were located in Alabama, VFJ could have deducted the royalty payments it made to them when calculating its Alabama tax liability. However, because Lee and Wrangler are located in Delaware – a State that does not share Alabama's policy of taxing royalty income – VFJ is denied a deduction for what no one disputes are ordinary and necessary business expenses. The add-back statute thus subjects VFJ's interstate payments to Lee and Wrangler to disfavored treatment resulting in an increased tax burden of over $1 million solely because Lee and Wrangler are located in Delaware, rather than in Alabama.

Accordingly, there can be no question that Alabama's add-back statute discriminates against interstate commerce in a manner prohibited by the Commerce Clause. See *Oregon Waste*, 511 U.S. at 99 ("discrimination" "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"). The decision below sustaining Alabama's add-back tax thus conflicts with the long line of cases invalidating discriminatory statutes that tax a transaction more heavily when it crosses state lines. See, *e.g.*, *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 169 (1999) (following *Fulton*); *Camps Newfound*, 520 U.S. at 580-81 (same).

As this Court explained in *West Lynn Creamery* v. *Healy*: "For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce . . . is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer." 512 U.S. 186, 202 (1994). Here, the Alabama add-back statute violates the Commerce Clause because it imposes a "differential burden" on transactions with corpora-

tions located outside Alabama in States that do not share Alabama's policy of taxing royalty payments.

3. To avoid this clear precedent, the Alabama Supreme Court adopted the view that the add-back statute did not discriminate against interstate commerce at all. According to that court, there is no discrimination because transactions involving corporations located in other States also are eligible for preferential treatment if they embrace fully Alabama's policy of taxing royalty payments to corporations. Pet. App. 62a. Specifically, the court below stated that the subject-to-taxation exception "applies when the related member's income is taxed 'in Alabama *or any other State* of the United States,'" and thus ruled that there is no discrimination because that exception "is implicated regardless of which state imposes a tax on the related member's income." *Id.*

That conclusion is wrong because it utterly ignores the discriminatory operation of Alabama's add-back regime. See *Complete Auto*, 430 U.S. at 279; *West Lynn Creamery*, 512 U.S. at 201 ("'The commerce clause forbids discrimination, whether forthright or ingenious.'"). The add-back statute is part of the Alabama tax code, which explicitly taxes royalty income. See Ala. Code § 40-27-1, art. IV ¶ 1(a). The add-back statute's "subject-to-tax exception" is expressly limited to States like Alabama, which *subject such payments to tax*. *Id.* § 40-18-35(b)(1). Thus, on its face, the add-back statute allows a deduction for royalty payments made to companies in Alabama (and States that share Alabama's tax policy), but disallows the deduction for royalty payments made to States outside Alabama that choose a different tax policy. The impact of Alabama's add-back statute is the same as a statute

that, in so many words, gave a deduction for payments to companies in taxing States, but denied the deduction for payments made to companies in States such as Delaware, which do not tax the payments. Accordingly, the add-back regime is "virtually *per se* invalid." *Oregon Waste*, 511 U.S. at 99.

To be sure, the Alabama add-back statute does not discriminate against *all* interstate transactions. But this Court has made clear that discrimination against transactions involving some, rather than all, States likewise violates the Commerce Clause. Thus, in *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269 (1988), this Court struck down an Ohio statute that denied a tax benefit for ethanol produced in States outside Ohio *unless* those States adopted Ohio's policy of granting tax benefits to Ohio ethanol producers. *Id.* at 274. This Court rejected the claim that "the Ohio provision, far from discriminating against interstate commerce, is likely to promote it, by encouraging other States to enact similar tax advantages that will spur the interstate sale of ethanol." *Id.* Instead, this Court held that the Ohio statute was invalid because (i) it "impose[d] an economic disadvantage upon out-of-state sellers" and (ii) "the promise to remove that [disadvantage] if reciprocity is accepted no more justifies disparity of treatment than it would justify categorical exclusion." *Id.* at 275.

Here, the Alabama add-back statute discriminates against interstate commerce because it imposes a differential burden on the royalty payments paid by VFJ solely because Lee and Wrangler are located in Delaware, rather than in Alabama or another State that shares Alabama's policy of taxing such payments. The Alabama add-back statute disrupts

interstate commerce by allowing a licensee to deduct royalty payments made to a licensor in Alabama (a taxing state), but requiring a licensee to add back those same payments when made to a licensor located in a non-taxing state. As in *New Energy*, Alabama's add-back statute imposes a discriminatory "economic disadvantage upon out-of-state" licensors that cannot be justified by Alabama's offer to remove that burden *if* the sister State in which Lee and Wrangler are located abandons its own tax policy in favor of Alabama's. See *id.*

Alabama may not "project[]" its taxing policy "into other States" by disfavoring transactions by corporations in Alabama with entities located in other States that do not share its policy of taxing royalty income. *Healy*, 491 U.S. at 334 (internal quotation marks and alteration omitted). Here, the Alabama add-back statute discriminates among States according to whether they tax royalty income, *i.e.*, whether they share Alabama's own tax policy. Alabama's approach classically "Balkaniz[es]" the Nation's economy by setting its tax policy to have different effects on interstate commerce in some States, but not others. *Camps Newfound*, 520 U.S. at 577 (quoting *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979)); see *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298, 312 (1992) ("Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills."). Indeed, it is these potential "[r]ivalries among States" that the Commerce Clause was intended to "ke[ep] to a minimum." *Granholm* v. *Heald*, 544 U.S. 460, 472 (2005).

4. Finally, the Alabama Supreme Court also contended that the add-back statute was not

discriminatory because, in its view, the statute "does not benefit in-state corporations to the detriment of, or disproportionately to, out-of-state corporations." Pet. App. 62a. That is plainly wrong. Just as the North Carolina statute at issue in *Fulton* "favor[ed] domestic corporations over their foreign competitors in raising capital among North Carolina residents," 516 U.S. at 333, the Alabama add-back statute favors domestic corporations over their out-of-state competitors by making payments to the former deductible to corporations located in Alabama.

Like the North Carolina statute in *Fulton*, which tended to "discourage domestic corporations from plying their trades in interstate commerce," *id.*, the Alabama add-back statute discourages Alabama corporations from entering into royalty agreements with related members located in certain other States or from setting up related members in non-taxing States. Indeed, the Alabama add-back statute impermissibly "has the effect of stripping away . . . the competitive and economic advantages" that Lee and Wrangler offer by virtue of their location in a State – Delaware – that has chosen a more favorable tax policy. *Hunt* v. *Washington State Apple Advert. Comm'n*, 432 U.S. 333, 351 (1977). The add-back statute thus violates the Commerce Clause's core aim of preventing States from "depriv[ing] businesses and consumers in other States of whatever competitive advantages they may possess based on the conditions of the local market." *Healy*, 491 U.S. at 339 (internal quotation marks omitted); see *Fulton*, 516 U.S. at 333 n.3 (Commerce Clause seeks to prevent States from "promot[ing] . . . in-state markets at the expense of out-of-state ones").

B. The Decision Below Conflicts With This Court's Decisions Holding That A State Must Fairly Apportion Taxes On Interstate Activity.

Review by this Court is independently warranted because the decision below conflicts with this Court's decisions requiring that a taxing State fairly apportion income by adopting a system that "'actually reflect[s] a reasonable sense of how income is generated.'" *Hunt-Wesson*, 528 U.S. at 466 (quoting *Container Corp.*, 63 U.S. at 169). Under the add-back statute, the determination whether to tax VFJ's royalty payment turns not on VFJ's conduct in Alabama, but on the tax policy of the State (Delaware) in which Lee and Wrangler are located.

1. The Commerce and Due Process Clauses permit a State to tax only its fair share of the income generated by a corporation operating in multiple States. See *Container Corp.*, 463 U.S. at 164. A State's method of apportioning income must ensure both "internal consistency" and "external consistency." *Id.* at 169; see *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). As relevant here, "external consistency" requires that the State's apportionment method "actually reflect[s] a reasonable sense of how income is generated." *Container Corp.*, 463 U.S. at 169. Specifically, external consistency demands that an apportionment formula "bear a rational relationship, both on its face and in its application, to [the taxpayer's activities] connected with the taxing State." *Norfolk & W. Ry.* v. *Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1968).

For example, in *Hunt-Wesson*, this Court analyzed a California statute that dictated how a corporation must allocate an interest-expense deduction between

unitary income (which California could constitutionally tax) and nonunitary income (which California could not tax).[5] 528 U.S. at 460-61. The California statute limited an interest-expense deduction against unitary income to the extent that a corporation had certain nonunitary income. *Id.* at 461-62. In effect, the California statute required the taxpayer to allocate interest-expense deductions first against nontaxable, "nonunitary" income and only thereafter against taxable, "unitary" income. *Id.*

Because the limitation on deductions increased the amount of "unitary" income subject to tax, this Court held that the deduction limit functioned as a tax on the nonunitary income. *Id.* at 464-65. As a result, the deduction limit could be justified only if it "reflected the portion of the expense properly related to nonunitary income." *Id.* at 465. The California statute failed that test because it unrealistically assumed that "*all* borrowing first supports nonunitary investment." *Id.* at 467. Because that assumption "fail[ed] to 'actually reflect a reasonable sense of how income is generated,'" the Court concluded that California's statute was invalid. *Id.* at 466 (quoting *Container Corp.*, 463 U.S. at 169).

Hunt-Wesson confirms that, in the context of apportionment of income, a State may not limit a deduction (and thereby increase its share of the taxpayer's income) based on a factor that does not

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[5] "Unitary income" includes "all income from a corporation's business activities, but excludes income that derives from unrelated business activity which constitutes a discrete business enterprise." *Hunt-Wesson*, 528 U.S. at 461 (internal quotation marks and alterations omitted). That "latter 'nonunitary' income normally is not taxable by any State except the corporation's State of domicile (and the States in which the 'discrete enterprise' carries out its business)." *Id.*

relate to the manner in which income is generated within the State. *Id.*

2. In conflict with *Hunt-Wesson* and its predecessors, Alabama's add-back statute limits VFJ's deductions for royalty payments in a manner wholly unrelated to VFJ's activity in Alabama. The add-back statute denies VFJ a deduction for an ordinary business expense because Lee and Wrangler are located in a State (Delaware) that has chosen not to tax the royalty payments they received from VFJ. That factor – the tax policy of a sister State – does not remotely "'reflect a reasonable sense of how income is generated.'" *Id.* (quoting *Container Corp.*, 463 U.S. at 169). Indeed, the tax policy of Delaware is irrelevant to VFJ's generation of income in Alabama. Whether VFJ made ordinary and necessary business payments to a company in Delaware (rather than a company in Georgia) should have no bearing on the amount of additional income tax that VFJ is required to pay in Alabama.

In concrete terms, if Lee and Wrangler were located in Georgia, rather than Delaware, VFJ's taxes in Alabama would decrease by about $1 million even though its business activity in Alabama would not have changed at all. Pet. App. 15a. Likewise, if Delaware changed its laws to tax the royalty payments made to Lee and Wrangler, then VFJ's tax liability in Alabama would decrease, even though its business activity in Alabama had remained the same.

3. The Alabama Supreme Court's effort to distinguish *Hunt-Wesson* is baseless. See Pet. App. 59a-61a. The court below concluded that Alabama's application of VFJ's apportionment factors to the royalty payments to Lee and Wrangler resulted in Alabama taxing only the share of the royalty payments that are attributable to Alabama. *Id.* at

59a-60a. That reasoning ignores the antecedent issue – namely, the arbitrary manner in which the add-back statute determines whether *any* of the royalty payments are subject to tax. That Alabama ultimately taxes only a portion of the royalty payments made to Lee and Wrangler does not address the threshold requirement that State law "'reflect a reasonable sense of how income is generated.'" *Hunt-Wesson*, 528 U.S. at 466 (quoting *Container Corp.*, 463 U.S. at 169). If Delaware had chosen to tax the royalty payments to Lee and Wrangler, then Alabama would not have taxed VFJ in Alabama with respect to those payments. The decision below offers no logical connection between a sister State's taxing policy and Alabama's decision to deny a deduction (and thus increase the tax) on VFJ's activities in Alabama.

Equally misguided was the Alabama Supreme Court's conclusion that "the evidence did not demonstrate that the application of the add-back statute has resulted in taxation that is out of proportion to VFJ's activities in this state." Pet. App. 60a-61a (citing *Container Corp.*, 463 U.S. at 170; *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 274 (1978); *Oklahoma Tax Comm'n*, 514 U.S. at 185). That assertion ignores that a State's apportionment formula must bear a rational relationship to the taxpayer's activity "both on its face *and* in its application." *Norfolk & W. Ry.*, 390 U.S. at 325 (emphasis added); 1 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 8.12[1], at 8-221 (3d ed. 2008) ("Hellerstein") ("[A] question that should be resolved before a court addresses the fairness of the application of an apportionment formula is whether

the formula is fair on its face.").[6] Here, the add-back statute is unconstitutional because it seeks to increase VFJ's taxable income based not on activity in Alabama, but on the tax policy of a sister State. On its face, the add-back statute fails to "'reflect a reasonable sense of how income is generated.'" *Hunt-Wesson*, 528 U.S. at 466.

Lastly, the Alabama Supreme Court defended the add-back statute also by deeming deductions "a matter of legislative grace" that the State could deny at will. Pet. App. 56a. That analysis is contrary to *Hunt-Wesson*, which looked to the substantive effect of a State's denial of a deduction, and concluded that it was an impermissible effort by the State to tax nonunitary income. 528 U.S. at 464-65. Under *Hunt-Wesson*, because Alabama's denial of a deduction increases Alabama's tax on VFJ (a multistate entity whose income Alabama may only tax in part), that

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[6] In contrast, the decisions on which the Alabama Supreme Court relied addressed whether the apportionment method at issue yielded an unfair application only *after* concluding that the method was fair on its face. In *Container Corp.*, this Court rejected the taxpayer's challenge to California's three-factor formula because the taxpayer failed *either* to "impeach[] the basic rationale behind the three-factor formula" *or* to demonstrate that the formula resulted in "enormous distortions" that would warrant its invalidation. 463 U.S. at 182-84. *Moorman* concerned a challenge to Iowa's single factor apportionment method, the facial validity of which the Court sustained as designed "'to reach[] . . . only the profits earned within the State,'" and therefore the taxpayer had to show that the formula "produced an arbitrary result in its case." 437 U.S. at 274-75. And, in *Oklahoma Tax Comm'n*, the Court discussed at length whether the State could choose not to apportion a sales tax on interstate bus tickets, 514 U.S. at 186-95, before engaging in the separate inquiry whether that method resulted in a "grossly distorted result," *id.* at 195-96 (internal quotation marks omitted).

deduction disallowance must be judged against fair-apportionment principles. Indeed, under the Alabama Supreme Court's reasoning, the California statute in *Hunt-Wesson* would not have violated the Constitution because it only denied a deduction, which the Alabama Supreme Court would view as "a matter of legislative grace." Pet. App. 56a.

The State of Delaware's policy decision not to tax the royalty income of Lee and Wrangler does not give Alabama the green light to increase VFJ's tax liability. By doing so, the add-back statute violates the Constitution by "reach[ing] beyond that portion of value that is fairly attributable to economic activity within [Alabama]." *Oklahoma Tax Comm'n*, 514 U.S. at 185.

II. REVIEW IS WARRANTED BECAUSE THIS CASE SQUARELY PRESENTS ISSUES OF SURPASSING IMPORTANCE TO TAXPAYERS AND STATES THROUGHOUT THE COUNTRY.

Review is warranted because the decision below conflicts with this Court's decisions setting forth the limits imposed by the Commerce Clause and Due Process Clause on state taxing authority. See Sup. Ct. R. 10(c). Prompt resolution of that conflict is critically important because nearly 20 other States have adopted similar add-back statutes that discriminate against interstate commerce in a manner forbidden by this Court's cases. A decision by this Court now would provide necessary certainty in this important area of the law, thereby obviating or diminishing the need for costly refund actions by taxpayers should this Court later conclude that these add-back statutes violate the United States Constitution. Both taxpayers and States throughout

the Nation would therefore benefit from immediate review of the decision below.

1. This Court has long recognized that the Commerce Clause guarantees "a national economic union unfettered by state-imposed limitations." *Healy*, 491 U.S. at 335-36. As such, this Court has granted review in Commerce Clause cases even where "the facts of this particular case, viewed in isolation, do not appear to pose any threat to the health of the national economy." *Camps Newfound*, 520 U.S. at 595; *Fulton*, 516 U.S. at 333 n.3 ("[W]e have never recognized a '*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause"). This Court has done so because "[t]he history of [the Court's] Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our Federal Union." *Camps Newfound*, 520 U.S. at 595.

Review is warranted in this case because Alabama's add-back statute strikes at the heart of these constitutional principles and does so on a grand scale. By denying a deduction to taxpayers who transact with businesses in certain other States, Alabama contravenes the non-discrimination principle that animates this Court's Commerce Clause jurisprudence. See, *e.g.*, *New Energy*, 486 U.S. at 275 (Commerce Clause prevents the imposition of "an economic disadvantage upon out-of-state sellers"); *West Lynn Creamery*, 512 U.S. at 201 ("'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.'"). Further, Alabama's add-back statute impermissibly attempts to project Alabama's tax policy extraterritorially by denying Alabama taxpayers otherwise available benefits if they deal

with businesses in States that do not share Alabama's policy of taxing royalty payments. See *Fulton*, 516 U.S. at 333 n.3; *Healy*, 491 U.S. at 334.

In this case alone, application of the add-back statute has increased VFJ's Alabama tax liability by over $1 million for a single tax year because VFJ made royalty payments to corporations located in Delaware, rather than corporations located in Alabama (or another State that shares Alabama's policy of taxing these royalty payments). Accordingly, even if Alabama's add-back statute were unique, the decision below would warrant this Court's review. *E.g.*, *Polar Tankers, Inc.* v. *City of Valdez*, No. 08-310 (cert. granted Dec. 12, 2008); *Hunt-Wesson, Inc.* v. *Franchise Tax Bd.*, 528 U.S. 458 (2000); *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160 (1999).

2. Alabama's add-back statute, however, is not unique. As the courts below recognized, nearly 20 other States have enacted similar add-back statutes disallowing deductions for interest and intangibles expenses. Pet. App. 12a n.3; see John C. Healy & Michael Schadewald, *Multistate Corporate Tax Guide* I-417 (2008) (citing state statutes). Although these add-back statutes vary in certain particulars, nearly all include a subject-to-tax exception of the sort contained in the Alabama statute at issue here.[7]

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[7] *See* Ark. Code Ann. 26-51-423(g)(1) ("A deduction . . . for interest or intangible related expenses paid by the taxpayer to a related party shall be allowed only if: (A) The interest or intangible-related income received by the related party is subject to income tax imposed by the State of Arkansas, another state, or a foreign government . . . ."); *accord* Ga. Code Ann. § 48-7-28.3(d)(2); 35 Ill. Comp. Stat. 5/203(a)(2)(D-18); Ind. Code § 6-3-2-20(c)(2); Ky. Rev. Stat. Ann. § 141.205(3)(b); Mich. Comp. Laws § 208.1201(2)(f)(ii); Ohio Rev. Code Ann. §§ 5733.042, .055(A)(2); Va. Code Ann. § 58.1-402(B)(8)(a)(1). Several States

Commentators have emphasized the constitutional issues raised by these add-back statutes.[8] As such, the need for review in this case is more pronounced because a ruling on Alabama's add-back statute likely will have an impact not only in Alabama but also in these other States that have analogous statutes. See *Nixon*, 528 U.S. at 385 (granting certiorari to assess conflict with prior Court ruling "[g]iven the large number of States that limit political contributions"); see also Robert L. Stern et al., *Supreme Court Practice* 246 (8th ed. 2002) (citing cases that highlight the importance of "the impact of the ruling below upon the validity of similar statutes in other states").

Moreover, the Multistate Tax Commission – a coalition of States that excludes Delaware and Nevada – has advocated that member States adopt

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allow the deduction only if the related payments are subject to tax above a certain rate. *See* Conn. Gen. Stat. § 12-218(c); D.C. Code § 47-1803.03(a)(19)(B); Md. Code Ann., Tax-Gen. § 10-306.1(c); Mass. Gen. Laws ch. 63, § 31*I*; 830 Mass. Code Regs. 63.31.1; R.I. Gen. Laws § 44-11-11(f)(3). Two States allow the deduction only if the related payments are subject to tax in those States. *See* N.J. Stat. Ann. § 54:10A-4.4; N.J. Admin. Code § 18:7-5.18(b)(3); N.C. Gen. Stat. 105-130.7A.

[8] *See, e.g.*, Charles F. Barnwell, *Addback: It's Payback Time*, 50 State Tax Notes 437 (Nov. 17, 2008) (surveying add-back statutes and noting that they "raise facial constitutional issues"); Giles Sutton & Todd Zoellick, *The Ins and Outs of Related Party Add-Backs*, Tax Executive 139, 143 (May-June 2005) (noting that add-back statutes are constitutionally suspect because they alter corporations' incentives to organize in certain states); Thomas H. Steele & Pilar M. Sansone, *Surveying Constitutional Theories for Challenges to the Addback Statutes*, 35 State Tax Notes 613, 620 (Feb. 28, 2005) ("Perhaps the most fundamental constitutional question presented by the addback statutes is whether a state, by its tax regime, may effectively penalize a taxpayer for doing business with an affiliate that operates in another state with a favorable tax regime.").

its model add-back statute. *See* Multistate Tax Comm'n, *Model Statute Requiring the Add-back of Certain Intangible & Interest Expenses* (Aug. 17, 2006) http://www.mtc.gov/Uniformity.aspx?id=500&ItemId=500. The proliferation of these add-back statutes will lead directly to the "'economic Balkanization'" that this Court's "Commerce Clause jurisprudence has long sought to prevent." *Fulton*, 516 U.S. at 333 n.3 (quoting *Hughes*, 441 U.S. at 325-26). Given the stakes involved, it is no surprise that the decision below has generated significant analysis by commentators of the constitutional issues implicated in these add-back statutes.[9]

3. This Court should provide necessary clarity by reviewing the decision below now. At present, States are administering add-back statues under a cloud of uncertainty. If this Court invalidates these add-back statutes, offending States will be required "to provide meaningful backward-looking relief" to any injured taxpayer. See *McKesson Corp.*, 496 U.S. at 31. That

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[9] *See*, e.g., Sarah McGahan, *The "Unreasonable" Exception to Addback*, [19-Aug.] J. of Multistate Tax'n & Incentives 6, 7 (2008) (noting that "state tax professionals followed [the decision below] closely"); Donald M. Griswold, *Addbacks Add Nothing to the Debate*, 48 State Tax Notes 1073 (June 30, 2008) (critiquing the decision below and contending that Alabama's add-back statute is unconstitutional); Thomas H. Steele & Pilar M. Sansone, *Alabama's Addback Case: The Trial Court Got It Right*, 48 State Tax Notes 593 (May 19, 2008) (critiquing the decision below and arguing that a State may not "discriminat[e] based on another state's decision to adopt a more favorable tax regime"); cf. Walter Hellerstein & John Swain, *Further Thoughts on the 'Subject to Tax' Exception in State Corporate Income Tax Expense Disallowance Statutes*, 48 State Tax Notes 597 (May 19, 2008) (approving the decision below but expressing doubt as to the statute's constitutionality because it denies the deduction for royalty payments that are taxable in another State).

relief will often consist of a retroactive refund payments because many States, like Alabama, require taxpayers to pay the tax (or pledge equivalent assets) before obtaining a meaningful opportunity to challenge the tax. *See id.* at 38 n.21; see Ala. Code § 40-2A-9(g)(b).

The longer States continue enforcing add-back statutes, the more States may eventually be forced to refund. Given the amount of taxes at issue, delay of just a few years will result in States facing enormous potential refund liabilities. Even in States that offer a meaningful pre-deprivation procedure, lingering doubts about add-back statutes will invite taxpayers' challenges, which create substantial administrative costs. Hellerstein, *supra*, ¶ 7.17[3][d] ("In light of the . . . enormous amounts of money at stake, these statutes inevitably will spawn a significant amount of litigation . . . .") (footnote omitted).[10] Those burdens are particularly noteworthy given this Court's recognition of "the imperative need of a State to administer its own fiscal operations." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 73 (1976). Under these circumstances, the need for prompt resolution of this issue would benefit not only taxpayers, but also the States that have adopted these statutes and other States that may follow suit.

Moreover, the decision below provides an ideal vehicle for this Court to resolve the constitutionality of these add-back statutes. The parties in this case litigated the constitutional issues vigorously, creating

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[10] *See, e.g, Family Dollar Stores of Ohio, Inc. v. Wilkins*, No. 2005-V-469, 2008 Ohio Tax LEXIS 5 (Ohio Bd. of Tax Appeals Jan. 4, 2008); *Virginia Dep't of Taxation*, P.D. 07-153, 2007 Va. Tax LEXIS 155 (Oct. 2, 2007); *Deluxe Fin. Servs., Inc. v. Director, Div. of Taxation*, No. 005522-2006 (N.J.T.C. filed May 30, 2006).

a comprehensive record during a multi-day trial in which "the premier experts in the fields of taxation and patents and trademarks" detailed how the Alabama add-back statute operates. Pet. App. 66a. In turn, the Alabama Court of Civil Appeals and the Alabama Supreme Court thoroughly, albeit incorrectly, addressed and passed on each of the constitutional claims at issue in this case, thereby giving this Court a comprehensive platform for review of the important constitutional questions presented by this petition. Thus, the value of allowing the issue to "percolate" in the lower courts is clearly outweighed by the importance of immediate guidance from this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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